

ESTTA Tracking number: **ESTTA589433**

Filing date: **02/26/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92054171
Party	Plaintiff Valeritas, Inc.
Correspondence Address	SHERI S MASON MORSE BARNES-BROWN & PENDLETON PC CITYPOINT, 230 THIRD AVENUE, 4TH FLOOR WALTHAM, MA 02451 UNITED STATES smason@mbbp.com, ttab@mbbp.com, tdunn@mbbp.com, sconnolly@mbbp.com, gkrakau@mbbp.com
Submission	Motion to Reopen
Filer's Name	Sheri S. Mason
Filer's e-mail	smason@mbbp.com, ttab@mbbp.com
Signature	/Sheri S. Mason/
Date	02/26/2014
Attachments	Motion to Reopen Time (M0622392).PDF(638385 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Valeritas, Inc.,	)	In the matter of U.S. Reg. No. 3,895,432
)	
Petitioner,	)	For the Mark: VGO
)	
v.	)	Filing Date: March 2, 2010
)	
VGo Communications, Inc.	)	Registration Date: December 21, 2010
)	
Registrant.	)	Cancellation No.: 92054171
)	

CONSENT MOTION TO REOPEN TIME

Petitioner respectfully requests that the Board grant this consent motion to reopen time, accept its settlement progress report attached hereto, and reset dates as set forth in the motion for an extension of time it filed on February 21, 2014 for the reasons set forth below.

BACKGROUND

Petitioner obtained consent from opposing counsel to file a motion for an extension of time with an updated settlement progress report on February 21, 2014, several days prior to the deadline. Petitioner drafted and executed the settlement progress report for submission to the Board on that same date. *See **Exhibit A.*** Petitioner timely filed the motion for an extension of time on that same date. *See **Exhibit B.*** Petitioner also attempted to timely submit, and believed it had timely and successfully submitted, the settlement progress report on that same date. Petitioner timely served on opposing counsel copies of the submitted motion and the settlement progress report. *See **Exhibit C.*** Petitioner did not realize that its attempt to timely file the settlement progress report failed until it received the Board's order on February 25, 2014 at 2:01 p.m. EDT, 14 hours after the close of discovery. Had Petitioner been aware that its attempt to

file the settlement progress report was unsuccessful, it certainly would have submitted it immediately and ahead of the deadline.

ARGUMENTS

In making its determination whether a party's neglect is excusable, the Board considers the following four factors: (1) the danger of prejudice to the non-moving party; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and, (4) whether the movant acted in good faith. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship et al.*, 507 U.S. 380, 395 (1993); *Pumpkin Ltd.*, 43 U.S.P.Q.2d at 1586 (adopting *Pioneer* factors for determining "excusable neglect").

(1) The danger of prejudice to the non-moving party

First, there is no danger of prejudice to the non-moving party. Indeed, Registrant consents to Petitioner's filing of this motion to reopen time. See Exhibit D. Moreover, Registrant consented to the motion for an extension of time, which was denied. Not only is there no prejudice to the non-moving party, reopening time is in the best interest of the non-moving party. Arguably, denying this motion to reopen time will prejudice the non-moving party because it was under the reasonable belief that the motion for an extension of time and the settlement progress report was submitted, which would likely result in the Board granting the extension of time. More importantly, the parties continue to make progress with the settlement negotiations, which have been ongoing as evidenced by the prior four progress reports submitted by the Parties.

(2) The length of the delay and its potential impact on judicial proceedings

Second, the length of the delay and its potential impact on judicial proceedings is minimal at best. The parties have been engaged in negotiations and are diligently attempting to finalize a settlement agreement, which is the reason the motion for an extension of time was filed. The deadline to file a motion for an extension of time was February 24, 2014 at midnight EDT. Petitioner received the order from the board denying its motion on February 25, 2014 at 2:01 p.m. EDT. Petitioner left a message with the Interlocutory Attorney within one hour after it received the order from the Board. After speaking to the Interlocutory Attorney at approximately 3 p.m. EDT, Petitioner requested and obtained from Registrant's counsel consent to file this motion to reopen time. Petitioner drafted and filed this motion less than 24 hours after becoming aware that the settlement progress report had inadvertently not been submitted, and less than 48 hours after the expiration of the deadline. Finally, granting this motion will conserve judicial resources by facilitating a possible settlement.

(3) The reason for the delay

Third, the reason for the brief delay was that Petitioner did not realize it had inadvertently not filed the progress report at the same time it timely filed its motion for an extension of time. As stated above, Petitioner obtained consent to file a motion for an extension of time with an updated settlement progress report from opposing counsel, drafted and executed the settlement progress report for submission to the Board, filed the motion for an extension of time, and timely served on opposing counsel copies of the submitted motion and the settlement progress report on February 21, 2014, several days prior to the deadline. Petitioner believed it had timely and successfully submitted the settlement progress report with the motion for an extension of time on the same date. Petitioner did not realize that its attempt to timely file the settlement progress

report failed until it received the Board's order. Simply stated, the brief delay is the result of Petitioner having believed in good faith it had successfully submitted the settlement progress report and received the receipt screen on its browser software, but, in fact, had inadvertently not done so.

(4) Whether the movant acted in good faith.

Fourth and finally, Petitioner believed in good faith it filed the settlement progress report when it filed its motion for an extension of time. Petitioner has submitted progress reports on four prior occasions. Petitioner drafted and executed the fifth settlement progress report for submission to the Board and filed the motion for an extension of time on February 21, 2014. In good faith, Petitioner believed it had timely and successfully submitted the fifth settlement progress report with the motion for an extension of time on the same date. Petitioner timely served on opposing counsel copies of the submitted motion and the settlement progress report. After receiving the order, Petitioner drafted and filed this motion within 24 hours.

CONCLUSION

Because there is no danger of prejudice, and indeed, denying this motion would prejudice the non-moving party, because the non-moving party consents to Petitioner filing this motion, because the length of delay is nominal, because the reason for the brief delay was because petitioner believed it timely filed the progress report several days prior to the deadline, and because the Petitioner acted in good faith, Petitioner respectfully requests that the Board grant its consent motion to reopen time, accept its settlement progress report (*see Exhibit A*) and reset the trial dates as set for in its motion for an extension of time, attached hereto as (*see Exhibit B*).

Respectfully Submitted,

Dated: February 26, 2014

VALERITAS, INC.

A handwritten signature in black ink, appearing to be 'SM' with a large loop and a horizontal line through it.

By: _____

Sheri S. Mason, Esq.

Thomas F. Dunn, Esq.

Scott J. Connolly, Esq.

Morse, Barnes-Brown & Pendleton, P.C.

CityPoint

230 Third Avenue, 4th Floor

Waltham, Massachusetts 02451

Tel: 781.622.5930

Fax: 781.622.5933

Email: ttab@mbbp.com

CERTIFICATE OF SERVICE

I, Sheri S. Mason, certify that a copy of the foregoing CONSENT MOTION TO REOPEN TIME was served on:

Michael J. Bevilacqua, Esq.
Barbara A. Barakat, Esq.
John V. Hobgood, Esq.
Wilmer Cutler Pickering Hale & Dorr LLP
60 State Street
Boston, Massachusetts 02109

by placing same with the U.S. Postal Service, via first class mail, postage pre-paid, this 26th day of February 2014.

A handwritten signature in black ink, appearing to be 'SSM' or similar, enclosed within a circular scribble.

Sheri S. Mason
Counsel for Valeritas, Inc.

EXHIBIT A

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Valeritas, Inc.,	)	In the matter of U.S. Reg. No. 3,895,432
)	
Petitioner,	)	For the Mark: VGO
)	
v.	)	Filing Date: March 2, 2010
)	
VGo Communications, Inc.	)	Registration Date: December 21, 2010
)	
Registrant.	)	Cancellation No.: 92054171

PETITIONER'S FIFTH REPORT ON SETTLEMENT PROGRESS

During the current extension, the parties have taken further actions in settlement discussions. Petitioner is currently reviewing the proposed comments from Registrant. The parties respectfully request a 30 day extension of time.

Issues that have been resolved.

As stated in Petitioner's first report, the parties agreed in principle to resolve this dispute by entering into a co-existence agreement by which the Registrant agreed to revise its logo design, which is implicated in this proceeding because the specimen of use submitted by Registrant displays the logo design on the product. As stated in Petitioner's previous reports, an agreement is being finalized by the parties.

Issues that remain to be resolved.

The parties are currently negotiating the remaining terms of the co-existence agreement.

A firm timetable for resolution.

Barring any extraordinary issues, the parties intend to resolve this matter by March 24, 2013.

Respectfully Submitted,

Dated: February 21, 2014

VALERITAS, INC.



By: _____

Sheri S. Mason, Esq.

Thomas F. Dunn, Esq.

Scott J. Connolly, Esq.

Morse, Barnes-Brown & Pendleton, P.C.

CityPoint

230 Third Avenue, 4th Floor

Waltham, Massachusetts 02451

Tel: 781.622.5930

Fax: 781.622.5933

Email: ttab@mbbp.com

EXHIBIT B

ESTTA Tracking number: **ESTTA588549**

Filing date: **02/21/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding.	92054171
Applicant	Plaintiff Valeritas, Inc.
Other Party	Defendant VGO Communications, Inc.
Have the parties held their discovery conference as required under Trademark Rules 2.120(a)(1) and (a)(2)?	Yes

**Motion for an Extension of Answer or Discovery or Trial Periods With
Consent**

The Close of Discovery is currently set to close on 02/22/2014. Valeritas, Inc. requests that such date be extended for 30 days, or until 03/24/2014, and that all subsequent dates be reset accordingly.

Time to Answer :	CLOSED
Deadline for Discovery Conference :	CLOSED
Discovery Opens :	CLOSED
Initial Disclosures Due :	CLOSED
Expert Disclosure Due :	02/22/2014
Discovery Closes :	03/24/2014
Plaintiff's Pretrial Disclosures :	05/08/2014
Plaintiff's 30-day Trial Period Ends :	06/22/2014
Defendant/Counterclaim Plaintiff's Pretrial Disclosures :	07/07/2014
30-day Trial Period for Defendant and Plaintiff in the Counterclaim :	08/21/2014
Counterclaim Defendant's and Plaintiff Rebuttal Disclosures Due :	09/05/2014
30-day Trial Period for Counterclaim Defendant and Plaintiff Rebuttal Testimony as Plaintiff ends :	10/20/2014
Counterclaim Plaintiff's Rebuttal Disclosures Due :	11/04/2014
15-day Rebuttal Period for Counterclaim Plaintiff Ends :	12/04/2014
Plaintiff's Trial Brief Due :	02/02/2015
Defendant's Trial Brief and Plaintiff in the Counterclaim Due :	03/04/2015
Brief for Defendant in the Counterclaim and Reply Brief, if any, for Plaintiff Due :	04/03/2015
Reply Brief, if any, for Plaintiff in the Counterclaim	04/18/2015

Due :

The grounds for this request are as follows:

- *Parties are engaged in settlement discussions*

Valeritas, Inc. has secured the express consent of all other parties to this proceeding for the extension and resetting of dates requested herein.

Valeritas, Inc. has provided an e-mail address herewith for itself and for the opposing party so that any order on this motion may be issued electronically by the Board.

Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by Facsimile or email (by agreement only) on this date.

Respectfully submitted,

/Sheri S. Mason/

Sheri S. Mason

ttab@mbbp.com

Michael.Bevilacqua@wilmerhale.com

02/21/2014

EXHIBIT C

Sheri S. Mason

From: Sheri S. Mason
Sent: Friday, February 21, 2014 3:46 PM
To: Bevilacqua, Michael (Michael.Bevilacqua@wilmerhale.com)
Cc: Barakat, Barbara (Barbara.Barakat@wilmerhale.com); Hobgood, John (John.Hobgood@wilmerhale.com); TTAB
Subject: FW: ESTTA. Stipulated/Consent Motion. confirmation receipt ID: ESTTA588549
Attachments: PETITIONER'S 5th REPORT ON SETTLEMENT PROGRESS (M0620810).PDF

Michael,

I attach a copy of the Stipulated/Consent Motion for a 30-day extension of time and a copy of Petitioner's Fifth Report on Settlement Progress, which has been electronically filed with the TTAB.

Thank you.

Sincerely,
Sheri

-----Original Message-----

From: estta-server@uspto.gov [<mailto:estta-server@uspto.gov>]
Sent: Friday, February 21, 2014 10:03 AM
To: TTAB; Michael.Bevilacqua@wilmerhale.com
Subject: ESTTA. Stipulated/Consent Motion. confirmation receipt ID: ESTTA588549

Stipulated/Consent Motion.

Tracking No: ESTTA588549

ELECTRONIC SYSTEM FOR TRADEMARK TRIALS AND APPEALS Filing Receipt

We have received your Stipulated/Consent Motion. submitted through the Trademark Trial and Appeal Board's ESTTA electronic filing system. This is the only receipt which will be sent for this paper. If the Board later determines that your submission is inappropriate and should not have been accepted through ESTTA, you will receive notification and appropriate action will be taken.

Please note:

Unless your submission fails to meet the minimum legal requirements for filing, the Board will not cancel the filing or refund any fee paid.

If you have a technical question, comment or concern about your ESTTA submission, call 571-272-8500 during business hours or e-mail at estta@uspto.gov.

The status of any Board proceeding may be checked using TTABVUE which is available at <http://ttabvue.uspto.gov>. Complete information on Board proceedings is not available through the TESS or TARR databases. Please allow a minimum of 2 business days for TTABVUE to be updated with information on your submission.

The Board will consider and take appropriate action on your filing in due course.

Printable version of your request is attached to this e-mail

ESTTA server at <http://estta.uspto.gov>

ESTTA Tracking number: ESTTA588549
Filing date: 02/21/2014

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding : 92054171
Applicant : Valeritas, Inc.
Other Party:Defendant
VGO Communications, Inc.

Motion for an Extension of Answer or Discovery or Trial Periods With Consent

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Time to Answer :CLOSED

Deadline for Discovery Conference :CLOSED Discovery Opens :CLOSED Initial Disclosures Due :CLOSED Expert Disclosure Due :02/22/2014 Discovery Closes :03/24/2014 Plaintiff's Pretrial Disclosures :05/08/2014 Plaintiff's 30-day Trial Period Ends :06/22/2014 Defendant/Counterclaim Plaintiff's Pretrial Disclosures :07/07/2014 30-day Trial Period for Defendant and Plaintiff in the Counterclaim :08/21/2014 Counterclaim Defendant's and Plaintiff Rebuttal Disclosures Due :09/05/2014 30-day Trial Period for Counterclaim Defendant and Rebuttal Testimony as Plaintiff ends :10/20/2014 Counterclaim Plaintiff's Rebuttal Disclosures Due :11/04/2014 15-day Rebuttal Period for Counterclaim Plaintiff Ends :12/04/2014 Plaintiff's Trial Brief Due :02/02/2015 Defendant 's Trial Brief and Plaintiff in the Counterclaim Due :03/04/2015 Brief for Defendant in the Counterclaim and Reply Brief, if any, for Plaintiff Due :04/03/2015 Reply Brief, if any, for Plaintiff in the Counterclaim Due :04/18/2015

The grounds for this request are as follows:
Parties are engaged in settlement discussions

Valeritas, Inc. has secured the express consent of all parties to this proceeding for the extension and resetting of dates requested herein.

Valeritas, Inc. has provided an e-mail address herewith for itself and for the opposing party so that any order on this motion may be issued electronically by the Board.

Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address of record by Facsimile or email (by agreement only) on this date.

Respectfully submitted,
/Sheri S. Mason/
Sheri S. Mason

ttab@mbbp.com

Michael.Bevilacqua@wilmerhale.com

02/21/2014

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A firm timetable for resolution.

Barring any extraordinary issues, the parties intend to resolve this matter by March 24, 2013.

Respectfully Submitted,

Dated: February 21, 2014

VALERITAS, INC.



By: _____

Sheri S. Mason, Esq.
Thomas F. Dunn, Esq.
Scott J. Connolly, Esq.
Morse, Barnes-Brown & Pendleton, P.C.
CityPoint
230 Third Avenue, 4th Floor
Waltham, Massachusetts 02451
Tel: 781.622.5930
Fax: 781.622.5933
Email: ttab@mbbp.com

CERTIFICATE OF SERVICE

I, Sheri S. Mason, certify that a copy of the foregoing PETITIONER'S FIFTH REPORT ON SETTLEMENT PROGRESS was served on:

Michael J. Bevilacqua, Esq.
Barbara A. Barakat, Esq.
John V. Hobgood, Esq.
Wilmer Cutler Pickering Hale & Dorr LLP
60 State Street
Boston, Massachusetts 02109

by email this 21st day of February 2014.

A handwritten signature in dark ink, appearing to be 'SM' or 'S. Mason', enclosed within a circular scribble.

Sheri S. Mason
Counsel for Valeritas, Inc.

EXHIBIT D

Sheri S. Mason

From: Bevilacqua, Michael <Michael.Bevilacqua@wilmerhale.com>
Sent: Tuesday, February 25, 2014 3:44 PM
To: Sheri S. Mason
Cc: Barakat, Barbara; Hobgood, John
Subject: RE: ESTTA. Stipulated/Consent Motion. confirmation receipt ID: ESTTA588549

We will consent.

Mike

Michael J. Bevilacqua | WilmerHale
60 State Street
Boston, MA 02109 USA
+1 617 526 6448 (t)
+1 617 526 5000 (f)
michael.bevilacqua@wilmerhale.com

Please consider the environment before printing this email.

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For more information about WilmerHale, please visit us at www.wilmerhale.com.

-----Original Message-----

From: Sheri S. Mason [<mailto:smason@mbbp.com>]
Sent: Tuesday, February 25, 2014 3:40 PM
To: Bevilacqua, Michael
Cc: Barakat, Barbara; Hobgood, John
Subject: RE: ESTTA. Stipulated/Consent Motion. confirmation receipt ID: ESTTA588549
Importance: High

Michael,

It appears that we did not properly submit the Progress Report with the extension of time when it was filed on Friday. As such, the TTAB did not receive the Progress Report. We spoke with the Interlocutory Attorney and we are in the process of drafting a Motion to Re-Open Time. We assume that you would not have an issue with us filing this motion; however, please confirm and we will include your consent in our motion.

Thank you.

Sincerely,
Sheri

<http://www.mbbp.com/>
Sheri S. Mason
Morse, Barnes-Brown & Pendleton, P.C.
CityPoint
230 Third Avenue, 4th Floor
Waltham, MA 02451
Main: (781) 622-5930
Fax: (781) 622-5933
smason@mbbp.com
<http://www.mbbp.com/>
Vcard

Corporate | IP | Licensing & Strategic Alliances | Employment & Immigration | Taxation

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Certificate of Service

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Respectfully submitted,

/Sheri S. Mason/

Sheri S. Mason

ttab@mbbp.com

Michael.Bevilacqua@wilmerhale.com

02/21/2014